

# In the United States Circuit Court of Appeals

## For the Ninth Circuit

CENTRAL CALIFORNIA CANNERIES,	
vs.	<i>Appellant,</i>
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	<i>Appellees.</i>
J. C. AINSLEY PACKING COMPANY,	
vs.	<i>Appellant,</i>
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	<i>Appellees.</i>
ANDERSON-BARNGROVER MANUFACTURING COMPANY,	
vs.	<i>Appellant,</i>
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	<i>Appellees.</i>
GOLDEN GATE PACKING COMPANY,	
vs.	<i>Appellant,</i>
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	<i>Appellees.</i>
J. F. PYLE & SON, INC.,	
vs.	<i>Appellant,</i>
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	<i>Appellees.</i>
HUNT BROTHERS COMPANY,	
vs.	<i>Appellant,</i>
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	<i>Appellees.</i>
GRIFFIN & SKELLEY COMPANY,	
vs.	<i>Appellant,</i>
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	<i>Appellees.</i>
SUNLIT FRUIT COMPANY,	
vs.	<i>Appellant,</i>
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	<i>Appellees.</i>

### PETITION FOR A REHEARING

On Petition for Leave to File in the Southern Division of the United States District Court for the Northern District of California, Second Division, an Original Bill in the Nature of a Bill of Review. Denied June 19, 1922.

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FILED  
JUL 10 1922

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### PETITION FOR A REHEARING

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*To the Honorable William B. Gilbert, Presiding Judge,  
and the Associate Judges of the United States  
Circuit Court of Appeals for the Ninth Circuit:*

The petitioners respectfully request the Court to reconsider its decision of June 19, 1922, denying petitioners' motion for leave to file in the Court below an original bill in the nature of a bill of review.

Technicalities aside, petitioners appeal to those broad powers which distinguish courts of equity—they appeal to the conscience of the Court under circumstances which warrant relief, if relief in any litigation were ever warranted. Reduced to simplest terms, both the defendants and plaintiffs here have been making serious, urgent and expensive efforts for a number of years, to the end that this Court might, as speedily as possible, make clear and definite the rights of the respective parties. The net result now is that we are again referred to the Court below with no direction to that Court defining the action to be taken.

We respectfully submit that this Court should at least state that, in its opinion, the petition for leave to file the original bill should be granted. We can not but feel that such is the opinion of this Court at this time, and we most respectfully urge upon the Court that justice would be served by an expression of this Court to that effect. It would clearly be to the interest of all the litigants and, we believe, would be welcomed by all and also by His Honor Judge Van Fleet. In view of the past denial by Judge Van Fleet of our motion for a request to the Circuit Court of Appeals

for permission to reopen the case and admit the new evidence which was introduced at the trials before Judge Trippet and Judge Hand and by them considered so important as to justify a different judgment than was rendered by Judge Van Fleet, and in view of the fact that our motion before Judge Van Fleet was exhaustively presented, both by oral argument and by written brief, we must assume that, without further light or expression from this Court, a second application will meet a like denial. This will probably mean months, if not years, of delay and litigation. In the meantime accountings will have to be made by all the various defendants in this case pending final appeal. Thousands and thousands of dollars will necessarily be spent in further litigation. All this time and expense can be saved by one word from this Court at this time.

One of the judges of this Court, in his concurring opinion in this case, has recognized the power of this court to determine the question of the right to file the bill and the desirability of its doing so in this case, but he seems to be of the opinion that the decision of Judge Van Fleet was prematurely formed, and that we may assume that when the matter is properly brought before the court it will have a different consideration. As a matter of fact, however, the motion in the first place was presented in open Court with oral argument which was followed by voluminous briefs, and His Honor, Judge Van Fleet, kept the motion under consideration for two years and a half and then made an order denying it in an opinion of about five thousand

words, in which he expressly stated that he had given the matter the very fullest consideration. *The question of our right to a rehearing must sooner or later come before this Court for decision.* We submit that it is not only just but proper, in view of the long, vexatious and expensive litigation that this case has already entailed, that this Court decide the question at this time.

In the case of Dunkley Company et al. v. Pasadena Canning Company et al., No. 3316, the issue as to the Grier spray device was in fact squarely presented—litigants, counsel and the Court below so recognizing it, and the record clearly showing it. (Note—the so-called “spray device” is the one referred to by Judge Rudkin in the Pasadena case as “not involved” in that suit.) Our position is that the holdings of this Court in and *subsequent to* the opinion in the Pasadena case and the proceedings in that case for certiorari in the Supreme Court, under the peculiar circumstances of the issues, the record and the earnest insistence of *both* sides that said spray device *was necessarily involved*, must be construed either as holding (1) that the Grier spray device as used by the California canners does not infringe, or (2) that the Grier spray device anticipates.

Formalities in the background, the question to be decided is, shall the fruit industry of California pay tribute to patentee Dunkley? The lye peeling of peaches had developed to full commercial proportions in California before a single soul in this State had ever heard of Dunkley, or of his alleged invention. Dunkley has, therefore, in fact contributed nothing to the art in point of time or method.



Heretofore the cases involving the Dunkley patent have to some extent turned upon the point of the time when Dunkley produced his first machine. In the patent office, Dunkley and his witnesses testified upon oath that the spray part—"that wooden frame"—of his machine "was made in *July, 1903*". Before Judge Van Fleet, he changed his testimony, slipping his date back to 1902, and the trial court believed him. In subsequent litigations, careful and painstaking trial judges, Judge Trippet of the Southern District of California, and Judge Augustus N. Hand of the Southern District of New York—after a most thorough and extended investigation, both held the Dunkley story false. The Dunkleys were forced to change their testimony in vital particulars in these later cases, making crucial admissions, and there was indisputable new evidence in abundance. This is all before this Court in this proceeding.

The petitioners feel that it would be consonant with equity should this Court consent to consider the whole record in accordance with the intimation contained in the concurring opinion, and determine the right to file the bill. This would be a just procedure and one ultimately saving the time of the Court and relieving defendants of a portion at least of the burden of pursuing the unnecessarily intricate mazes of presenting a rightful defense in an already oppressive cause.

This suit has been pending seven years. Under the order rendered, it is obvious that the litigation has not further progressed. The trial Court will be confused. Counsel will urge opposite views as to the indications

of this Court, and the whole matter will ultimately be here again for solution.

In more formal language, the petitioners respectfully urge error in the ruling heretofore made upon the motion, as follows:

1. The Court has erred in failing to consider proceedings of this Court and of the United States Supreme Court subsequent to its written opinion in the case of Dunkley Company and Michigan Canning & Machinery Co., Plaintiffs-Appellants, v. Pasadena Canning Company and George E. Grier, Defendants-Appellees, Equity No. 3316, wherein and whereby the holding of Judge Trippet declaring Dunkley Patent No. 1,104,175 anticipated by Grier and others was in effect approved and affirmed.

2. The Court has erred in failing to note that the defendants in the Pasadena case were charged with using two different types of devices—the first of which was used during the entire season of 1914, and that this machine was precisely the same type of apparatus which is involved in the case at bar, and that the use of said machine was the most important issue in the Pasadena case, and that damages were claimed for such use, unless it is to be understood by the language of the opinion of this Court of June 19, 1922, that this Court has held said first Grier machine does not infringe.

3. The Court has erred in holding that:

“There is no apparent conflict between the decree of the District Court for the Northern District of California, affirmed by this Court on appeal October 1, 1917, holding the Dunkley patent No.



1,104,175 valid and infringed, Central California Canneries Co. v. Dunkley Co., 247 Fed. 790, and the decree of Judge Trippet in the Southern District of California as affirmed in this Court in the same case on appeal, 261 Fed. 386.”

4. The Court has erred in not granting defendants-appellants’ petition for leave to file in the Southern Division of the United States District Court for the Northern District of California, Second Division, an original bill in the nature of a bill of review.

5. The Court has erred in restricting defendants to the authority “to file in the lower Court an appropriate petition for a rehearing”, and in authorizing that Court “to entertain and make disposition of the same”.

This petition is based upon all of the records and files in this case (which now include the records and files in the Pasadena case).

CENTRAL CALIFORNIA CANNERIES,

H. Z. Baldwin, Secretary,

J. C. AINSLEY PACKING COMPANY,

J. C. Ainsley, President,

ANDERSON-BARNGROVER MANUFACTURING COMPANY,

W. C. Anderson, President,

GOLDEN GATE PACKING COMPANY,

E. E. Chase, President,

J. F. PYLE & SON, INC.,

H. T. Pyle, President,

HUNT BROTHERS COMPANY,

G. H. Bradt, General Manager,

GRIFFIN & SKELLEY COMPANY,

Andrew Griffin, Secretary,

SUNLIT FRUIT COMPANY,

P. E. Bush, Vice-President.

I hereby certify that I am one of the attorneys for petitioners herein; that the foregoing petition has been prepared, signed and filed by their direction and authority; that the allegations contained in said petition are true to the best of my knowledge and belief, and that said petition is in my opinion, well founded and is not presented for the purpose of delay.

KEMPER CAMPBELL.

### Discussion.

The opinion of the Court and order upon which a rehearing is asked is reproduced herein as an appendix hereto.

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**THE RECORD CLEARLY SHOWS THAT THIS COURT HAS IN EFFECT HELD EITHER (a) THAT THE TYPE OF MACHINES INVOLVED HERE DOES NOT INFRINGE, OR (b) THAT THE PATENT IS ANTICIPATED BY GRIER AND OTHERS. REHEARING SHOULD THEREFORE BE ORDERED.**

In the case of Dunkley Company et al., v. Pasadena Canning Company et al., there were *two* alleged infringing machines involved: (1) A shaker spray type employed during the season of 1914 (and upon which probably 1000 tons of peaches were peeled that season, Rec. p. 338), and (2) the so-called "Pasadena Washer" used by defendants thereafter. As to the first machine (called "Grier's first machine"), Judge Trippet held the patent anticipated by Grier and others. As to the second, Judge Trippet held that this machine did not infringe. On appeal the decree below dismissing the bill was affirmed without qualification, but Judge Rudkin inadvertently incorporated the following language in his opinion:

"the question of infringement was not there involved because the Grier machine or device then before the court is not involved in the present case."

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### MOTION TO REHEAR—PASADENA CASE.

Thereupon, the appellants, Dunkley Company and Michigan Canning & Machinery Co., filed a "Motion to

Re-hear” in which was clearly pointed out the error of the above statement in the opinion. We quote from appellants’ (Dunkley Company and Michigan Canning & Machinery Co.) motion on file in case No. 3316, and now a portion of the record here:

“Rehearing is Requested Because the Court has Failed to Consider Grier’s first Structure, which is Identical with that Held to Infringe in the Former Decision of this Court. See Assignment of Error 63.

“In the event that this Court affirms the decree of the Court below dismissing the bill of complaint, it may be hereafter contended that the structure, which this Court formerly held was an infringement, is now held not to infringe. We apprehend that this Court had no intention of entering such a diametrically opposed order, and hence we bring the matter to the attention of the Court for a rehearing to avoid the confusion that would thus follow.

“In this case the main defendants’ machine sued on in the original bill of complaint is identical in structure with the defendants’ structure held to infringe in the Central California Canneries case, 247 Fed. 790. Defendant Grier built both machines, and this machine of the defendants here was used after notice and during the peach season of 1914, by both the defendants herein. (The Pasadena structure was later and was brought in by supplemental bill.)

*“Thus an order of this Court affirming the decree of the Court below is, on the face of the pleadings and proofs, a substantial holding that the structure held to infringe in the first case is not an infringement here. The result will apparently be two diametrically opposed orders in force at the same time. \* \* \*”* (Italics ours.)

“Evidently we failed to bring home to this Court the fact that the machine that was held to infringe there was a structure made by Grier, and

that a machine of precisely similar structure was used by Grier and the Pasadena Canning Co., in violation of plaintiffs' rights. This is made the subject matter of Assignment of Error 63, which assignment is in the following language, Rec. p. 14, Vol. XI:

'63. The Court erred in not holding that the machine of George E. Grier before the United States Court of Appeals for the Ninth Circuit, appearing in exhibit, Certified Copy of Record of Appeals, pages 27-35, inclusive, and also exemplified in Plaintiffs' Exhibit No. 9, is an infringement of patent No. 1,104,175, and that the use thereof constitutes an infringement of the process patent No. 1,237,723.'

“(Exhibit No. 9 is appended hereto.)

“This is defendants' first structure and is discussed at p. 240 of plaintiffs-appellants' main brief, under the heading,  
'Infringement is Clear. Assignments 62 and 63.'

\* \* \*

“We also urged this same thing in the 'conclusion' of our main brief, in paragraph at bottom of p. 255 and top of p. 256, which we here repeat:

\* \* \*

“Defendants-appellees treat this earlier structure as in the case, at pp. 541-2 of their brief, under the title of

'Non Infringement'

as follows (bold face type by plaintiffs counsel):

\* \* \*

“We believe this Court has no desire to order the affirming of a decree dismissing the bill of complaint where it thus appears that the defendants had been making use of a machine identical in structure with the machine held to infringe in the Central California case, *supra*. We do not believe this Court intended to approve two diametrically opposed decrees. This contention is now possible,

and we urge on the Court that the matter be cleared up.

"We therefore respectfully request a rehearing on this particular Assignment of Error 63. We believe the error is due purely to oversight, and that the same can readily be corrected from a consideration of matters already in the briefs without further argument. This earlier structure, exemplified in Exhibit No. 9 hereto appended and illustrated in the Exhibit A, Record of Appeals, pp. 27-35, should be held to be an infringement."

While we have here reproduced but meager portions of the petition, *this point was the basis of the motion* to rehear Dunkley Company's appeal in the Pasadena case and the matter was thoroughly gone into in the "Discussion" appended to the petition. The petition was denied.

NOTE: There was no concession by defendants in the case at bar as intimated in the "Discussion" referred to, that the first Grier machine infringed if subsequent. The stipulation was merely to the effect that defendants used the first Grier type of machine. Non-infringement was pleaded by defendants and is still urged.

In the Pasadena case (261 Fed. 386) this Court speaking through Judge Rudkin held:

"Under the Dunkley patent the fruit is delivered into an endless conveyor, and passes between rotary brushes for a distance of about six feet; the brushes rotating the peach as it passes along, so that every portion of the surface is subjected to jets of water striking the fruit tangentially from perforated pipes arranged along the passage, and driven with such force as to remove the disintegrated skin



remaining on the peach and cleansing the particles from the brushes.” \* \* \*

“The art of peeling peaches by the use of hot caustic soda or lye, and then removing the disintegrated skin by the use of water, was well known years before the application for the Dunkley patent was made. The manner of using the caustic soda or lye was always the same, but the mode of removing the disintegrated skin varied from time to time, from merely dipping the peaches in water in a perforated bucket, to the use of a common hose. *In view, therefore, of this prior state of the art, the Dunkley patents must be limited to the particular means employed, and those means must be limited to directing peeling jets of water upon the fruit as described in the patent.* For if the patent should be construed to cover every possible means for removing the disintegrated skin by the use of water it would grant an unwarranted monopoly, and, furthermore, the patent would be rendered utterly void because of anticipation and prior use.” (Italics ours.)

In commenting upon the foregoing language, this Court’s opinion herein states:

“It held that the Dunkley patents were limited to the particular means employed for removing the skin of fruit after treatment, and as so limited, the patents were not infringed by the defendants in that case.”

Judge Hand in the case of Dunkley Company v. California Packing Corporation, 277 Fed. 989, also has held that the circular bristle brushes for the turning of the fruit is “an essential part of the Dunkley device.”

**MOTION TO REMAND AND REOPEN—PASADENA CASE.**

After the denial of the motion of Dunkley Company, et al., to rehear, another motion was presented by said appellants, the same being set down for oral argument and being earnestly and elaborately presented before this Court, consisting of Circuit Judge Gilbert presiding, Circuit Judge Hunt and District Judge Wolverton. The motion was

“for an order to remand with leave to reopen the case to make the proofs complete, or, in the alternative, that the court in its mandate direct the District Court to enter its decree without prejudice as to said Exhibit 9 (the Grier first machine)”.

In the argument counsel for both parties pointed out that the 1914 first Grier spray device was in the case and that the litigation had been tried upon that theory at an enormous cost to the litigants. The patent in suit issued July 21, 1914, prior to the 1914 peach season. Grier did not install his Pasadena washer until *one year later, 1915*. The following excerpts from the records were read or epitomized to the Court: See transcript of record Dunkley et al. v. Pasadena Canning Company et al., No. 3316:

(Pages 1309-1310): “(The Court and counsel above named visiting the plant of the Pasadena Canning Company for the purpose of the inspection of machinery, the following discussion ensued):

\* \* \* \* \*

“Mr. GRIER. This is the old original machine.

\* \* \* \* \*

“Mr. LYON. The delivery of the peaches, as carried out there, is onto the old original first Grier Machine; not the one that was used here, but the one that was used in Los Angeles, at the East Side

Cannery; and after you get beyond this 'grasshopper' it is all the original machine, being Exhibit K of the San Francisco case.

"Mr. CHAPPELL. This is photographed in the San Francisco record, in case No. 203.

"(Court produces photograph.)

"Mr. HENEY. This is a photograph of the alleged interfering [infringing] machine. We will operate in a little while now."

(Pages 1311-1312): "Mr. LYON. Water is turned on the old Grier first machine to illustrate the spray of water on the peaches.

"The COURT. That is all it does—just shake them back and forth?

"Mr. CHAPPELL. Yes, running the peaches under the spray and vibrating them as they advance.

"The COURT. And turning them over as they fall down these steps?

"Mr. CHAPPELL. Yes.

\* \* \* \* \*

"The COURT. What do you call this—a vibrator?

"Mr. GRIER. It is the shaker, we call it.

"(Machine being operated by power.)

"Mr. LYON. You will notice the baffles in there may choke, so that all peaches have to absolutely come under that last spray.

"Mr. HENEY. About what pressure is on there now, Mr. Grier?

"Mr. GRIER. That is now about 30 pounds.

"(Small quantity of whole peaches run through 'grasshopper' and pass on out under observation of court.)

"Mr. HENEY. What pressure do you work it on when you run the peaches through to peel (referring to shaker)?

"Mr. GRIER. Well, we had about 60 pounds on this machine.

"Mr. HENEY. And that is about how much now?

"Mr. GRIER. Oh, I would judge about 35 or 40 pounds. We had a larger pipe here when we ran it regularly.

"Mr. LYON. After they leave this spraying machine, here is one tank that runs water through, and you will notice they go from that into another, and another, and finally it dumps them out onto the conveying devices."

Hearing resumed at court room—Testimony of George E. Grier.)

(Page 3511): "Mr. HENEY. I show you Exhibit B-2 in the San Francisco case, and ask you if that is a photograph of the machine about which I have been just asking you, and which I have referred to as the grasshopper or shaker machine.

A. Yes, sir; that is the machine."

(Page 3528): "The COURT. Well, I will overrule the objection. This suit, Mr. Chappell, was pending at the time these letters were written and involved this previous invention. This suit involves the previous machine made by this defendant, and previous alleged infringement, doesn't it?

"Mr. CHAPPELL. Yes. At the time this was written the process patent had not been included by the amendment.

"The COURT. Well, you don't understand. This litigation involves any liability that the defendant may be liable to to the plaintiff concerning what is known as the grasshopper and shaker machine."

(Page 3547): "Q. By Mr. Chappell. When did you construct the machine which you showed to Mr. Dunkley in the spring of 1915? [Pasadena washer—second machine.]

"A. I constructed it in the spring some time after the first of the year.

"Q. You had never peeled any peaches with it at that time, had you?

"A. No, sir."

There is also in the Pasadena record, at pages 666-7, the following (excerpt from opening statement of Mr. Chappell, counsel for Dunkley Company):

“\* \* \* Over here is a structure that did double duty at San Francisco (indicating). It was said to be an anticipation, and the proofs developed it was an infringement, and was held to be an infringement there. Peaches drop at this point, and come down to this step, and as they step here are turned over the other side up. And this whole part is a shaker, something like——

The COURT. A vibrator.

Mr. CHAPPELL. Something like a fanning mill shaker; it has a motion similar to a fanning mill shaker. And these pipes with spray nozzles on were disposed there (indicating).

\* \* \* \* \*

Mr. CHAPPELL. The peaches that came down through there were sprayed on one side, until they came to this point, when they tumbled down one step, and that turned them over, and they were then sprayed on the other side.

We stipulated the illustrations that might represent the defendants' machine in that case. We are somewhat surprised to find they also offer proof it was an anticipation. The court held it was not an anticipation, but an infringement in that case.

*This structure was sworn to by Mr. Grier in that case to have been in use in the season of 1914, and is the first structure charged to infringe in this case.*”





(Page 3825): "I continued to use the machine which I built in 1903 in the Pasadena Company's plant until the end of the 1914 peach season. I used it continuously every year."

\* \* \* \* \*

"I identify Defendants' Exhibit B 1 to 8, as photographs of the East Side machine built in 1903."

(Page 3830): "I had received a notice about the Dunkley patent here in suit before I discontinued the use of the machine. I had the design of the other machine in my head before I received that notice. I discontinued the use of the shaker and spray machine because soft freestone peaches were washed away frequently with these sprays. It was practically ruining our business and the canning business by peeling peaches that were too green. We could peel clings. They are like a piece of rubber, but freestone peaches we would ruin the industry with them by doing it. The jet of water would cut out too much of the freestone peaches away. We could peel the green peaches."

Testimony in the case at bar was also cited as follows:

(Page 315): "Q. You stated, Mr. Grier, that in 1903 you built two of these machines. How long did you continue to use the one in the Pasadena Canning Company's plant?

"A. Until the end of the 1914 peach season.

"Q. Did you use it each year?

"A. Continuously, yes, every year.

(Page 320): "Q. January, of this year?

"A. Yes.

"Q. And this tank and shaker and spray-pipe of Defendants Exhibit "K" (referring to photographs of Defendants' Exhibit K, one of Grier's first devices) are part of the machine of the East Side Canning Company?

"A. Yes.

"The COURT. He has said that several times.

"Mr. MILLER. It is all leading, anyway.

“The Court. I pay attention to the evidence as it comes in. It is not necessary to repeat it.

“Mr. LYON. I did not want any chance taken as to the identification. That is all.”

In addition to the foregoing, other testimony bearing upon this matter may be found at pages 3510, 3511, 3512, 3513, 3514, 3515, 3516, 3518, 3519, 3521, 3529, 3536, 3822, 3823, 3824, and 3829 of the Record on Appeal in the Pasadena case.

Both sides urged this Court that the statement of Judge Rudkin was an obvious inadvertence in view of the record and the briefs. But counsel for appellees therein urged that the same matters had already been presented to this Court in appellants' petition to rehear, and had had the Court's due consideration; that it was inconceivable that under a conceded condition of the record the real issue in the case had been wilfully ignored by the Court, and that therefore by the Court's denial of the motion to rehear the Circuit Court of Appeals had affirmed Judge Trippet as to the 1914 machine, either upon the ground that the 1914 machine did not infringe or that the spray feature of the Dunkley device was anticipated.

At the conclusion of the argument (reported and filed) Presiding Judge Gilbert, after consultation with his colleagues, announced from the bench:

“It occurs to the court that the only question here is whether or not a sentence in the opinion of this court should be corrected or modified, and that matter will be sent to the judge who wrote the opinion of this court on the merits of the case. We were very firmly of the opinion that the deci-

sion of the court below should be affirmed. The present motion will be denied. It is possible that the sentence in the opinion referred to may be corrected."

#### **CERTIORARI—PETITION AND RESPONSE. PASADENA CASE.**

Thereupon, appellants, Dunkley Company and Michigan Canning & Machinery Co., petitioned the United States Supreme Court for a Writ of Certiorari. We reproduce quotations from their petition:

"In a petition to rehear, the attention of the court [Circuit Court of Appeals for the 9th Circuit] was then directed to its apparent error in that behalf, and assignment of error 63 was particularly brought to its attention, pointing out the claimed infringement by the said Grier first structure in the following language, Rec. Vol. XI, p. 14:

(Here follows assignment of error number 63 heretofore quoted.)

"Plaintiffs-appellants pointed out that that structure, Exhibit 9 (the Grier first structure), had also been submitted in the briefs for both parties without objection, and was identical with the structure passed upon in the former decision, 247 Fed. 790.

"This petition to rehear was denied in an order of the Court of Appeals entered January 5, 1920, thereby refusing consideration to the matter urged. The opinion of the Court of Appeals stands unchanged.

"Thereupon, the court having persisted in its holding that the device was not before it, motion was made for an order to remand with leave to reopen the case to make the proofs complete or, in the alternative, that the court in its mandate direct the District Court to enter its decree without prejudice as to said Exhibit No. 9 (the Grier first machine).

“On hearing of this motion, before Gilbert, Circuit Judge, presiding, Hunt, Circuit Judge, and Wolverton, District Judge, (Judge Rudkin, the writer of the opinion, not present), defendants-appellees’ counsel, Mr. Campbell, appeared. He in open court brought to the attention of the Court that the alleged infringing device, Exhibit No. 9, was before it. He said, Rec. Vol. XI, p. 49:

“ ‘Counsel’ (referring to counsel for appellants) ‘made it very clear in his discussion appended to that petition’ (referring to the petition to rehear) ‘that this machine was in the case below, was considered by counsel upon both sides and by the court.’

“He says further on, Rec. Vol. XI, p. 56:

“ ‘I will read briefly from the testimony to show how clearly all this appears in the record.’

“ ‘and then read from Mr. Grier’s testimony, identifying the Grier first structure as in use by defendants after the Dunkley patent issued and after notice of infringement and prior to the bringing of this suit, and on the subject as to whether that structure was in the case, counsel for defendants-appellees at Rec. Vol. XI, p. 58, say:

“ ‘It is just as clear as the English language can make it, and it is in the record time after time that that machine was used.’

“ ‘Then to make it emphatic, counsel for defendants, says:

“ ‘If there is any possible, conceivable doubt about it, we are willing to stipulate that that machine was used during the season of 1914.’

“ ‘Then to make it doubly clear and emphatic counsel for defendants-appellees further said:

“ ‘The entire case was tried upon that theory. Nine-tenths of the evidence in this voluminous record is directed to that point. The case was so argued; it was so considered by the court below, and it was so argued here upon appeal, and so briefed upon appeal, and the matter has been di-

rectly called to your Honor's attention in a petition for a rehearing, and the matter has been concluded by your Honor's ruling denying the petition for rehearing.'

"There followed considerable discussion. Thereupon the Court said:

" 'Judge Gilbert: It occurs to the court that the only question here is whether or not a sentence in the opinion of this court should be corrected or modified, and that matter will be sent to the judge who wrote the opinion of this court on the merits of the case. We were very firmly of the opinion that the decision of the court below should be affirmed. The present motion will be denied. It is possible that the sentence in the opinion referred to may be corrected.'

"See proceedings, Rec. Vol. XI, p. 61 (Note that Judge Rudkin wrote the opinion).

"The order denying the motion was entered on February 2, 1920, Rec. Vol. XI, p. 62. Thereafter Judge Rudkin, the writer of the opinion, changed the single word 'appellants' to 'appellees' in identifying the Pasadena machine or Grier's second structure. \* \* \*

"The Court thus, although repeatedly urged by plaintiffs-appellants' counsel, as to fact of said first Grier machine being in the case, which fact was conceded most emphatically in open court by defendant-appellees' counsel, persisted in its opinion that the said Grier first structure in question is not before it. This is done, notwithstanding that the matter was submitted to it by briefs by both parties, and that there was never any objection to the proofs by counsel for either party, either in the trial court or in the appellate court. By such refusal the plaintiffs-appellants' are substantially denied a hearing and their day in court.

"The language of the opinion at Rec. Vol. p. 32, thus stands, viz.:



“ ‘the question of infringement was not there involved, because the Grier machine or device then before the court is not involved in the present case.’

“This ruling is contrary to the evidence and to the concessions and statement of counsel for both sides, and is wholly unwarranted by the record. The insufficiency of the evidence is ruled by the court of its own motion, in the appellate court, without opportunity for correction, modification or relief.”

In reply respondents, Pasadena Canning Company and G. E. Grier, stated that if the United States Supreme Court was of the opinion that the Circuit Court of Appeals for the Ninth Circuit had not passed upon the merits of the case as to the 1914 machine, then respondents would unhesitatingly join with the petitioners in requesting the Court to take cognizance of the case. Respondents therein presented this phase of the matter to the Supreme Court as follows:

“PETITIONERS NOT DENIED A HEARING.

“Was the legal effect of the proceedings in the Circuit Court of Appeals subsequent to the handing down of the written opinion, a refusal of that court to pass upon the issues necessarily before it with the first Grier machine in the case, or as expressed by counsel for petitioners, an adherence to the statement contained in the original opinion that the machine was not involved? If so, we unhesitatingly join with the petitioners in requesting this court to take cognizance of the case. It would, indeed, be a grave judicial wrong for parties to be turned out of court without a determination of issues actually presented and necessary to be decided to a complete disposal of the controversy, especially when both parties had gone to heavy expense in litigating these very issues.



“But we respectfully insist that the Circuit Court of Appeals has disposed of these very issues adversely to the plaintiffs. The issues and the necessity of a decision thereon were forcefully presented to the court in the petition for a rehearing. In view of the petition, the court could not very well have been in any doubt as to the first Grier machine being in the case. When the court denied a rehearing, the effect of its order was to resolve the issues thus specifically called to its attention and before it against the plaintiffs. The court adhered to its judgment of affirmance of the decree appealed from. The issues were all purely issues of fact. The only question was whether the findings of the trial judge were ‘supported by the credible testimony of reputable witnesses’. (*Butte & Superior Copper Co. v. Clark & Montana Realty Co.*, 249 U. S. 12, decided March 3, 1919.) No discussion of these issues was necessary. The effect of an adjudication is not dependent upon a written opinion. (*Napa Valley Electric Co. v. Railroad Commission*, decided by United States Supreme Court, January 19, 1920, and reported in U. S. Supreme Court advance sheets, Feb. 15, 1920, p. 202.) A denial of a petition for rehearing may be a binding determination of issues presented by the petition. (*Mayo v. Washington*, 122 N. C. 5; 40 L. R. A. 163, 166.)

“That the court considered its denial of a rehearing, under the circumstances a disposition of these issues, is quite plain from the statement delivered on February 2 at the conclusion of the argument upon plaintiffs’ supplemental motion, when it was said, among other things:

“‘We were very firmly of the opinion that the decision of the court below should be affirmed.’

“While it might have been gratifying to counsel to have had Judge Rudkin rewrite his opinion, we can very readily appreciate how he considered such

a course unnecessary. The issues had been fully determined by the denial of a rehearing. The effect of the denial had been construed by the court. Indeed, to argue otherwise would be to cast an unwarranted reproach upon our judicial processes.

“And it is significant that petitioners themselves, at points in the petition, recognize that the effect of the action of the Circuit Court of Appeals was to determine these very issues adversely to them (p. 2 of Petition).”

**CONCLUSION.**

In view of the foregoing *record* of proceedings in the Pasadena case, both in this Court and in the United States Supreme Court, unless it be assumed that this Court refused to pass upon the most essential and the most important issue in a case carefully, elaborately and expensively presented before it, an unwarranted assumption we are sure, it must follow that this Court has either held (a) that the first Grier shaker and spray machine (the 1914 use) did not infringe (overruling the decision of Judge Van Fleet in the case at bar), or, (b) that Judge Trippet's decision declaring the Dunkley spray device anticipated was affirmed.

In either case it is respectfully submitted that this Court should direct the lower court to grant leave to the appellants to file in the Southern Division of the United States District Court for the Northern District of California, Second Division, "an original bill in the nature of a bill of review".

Respectfully submitted,

KEMPER CAMPBELL,

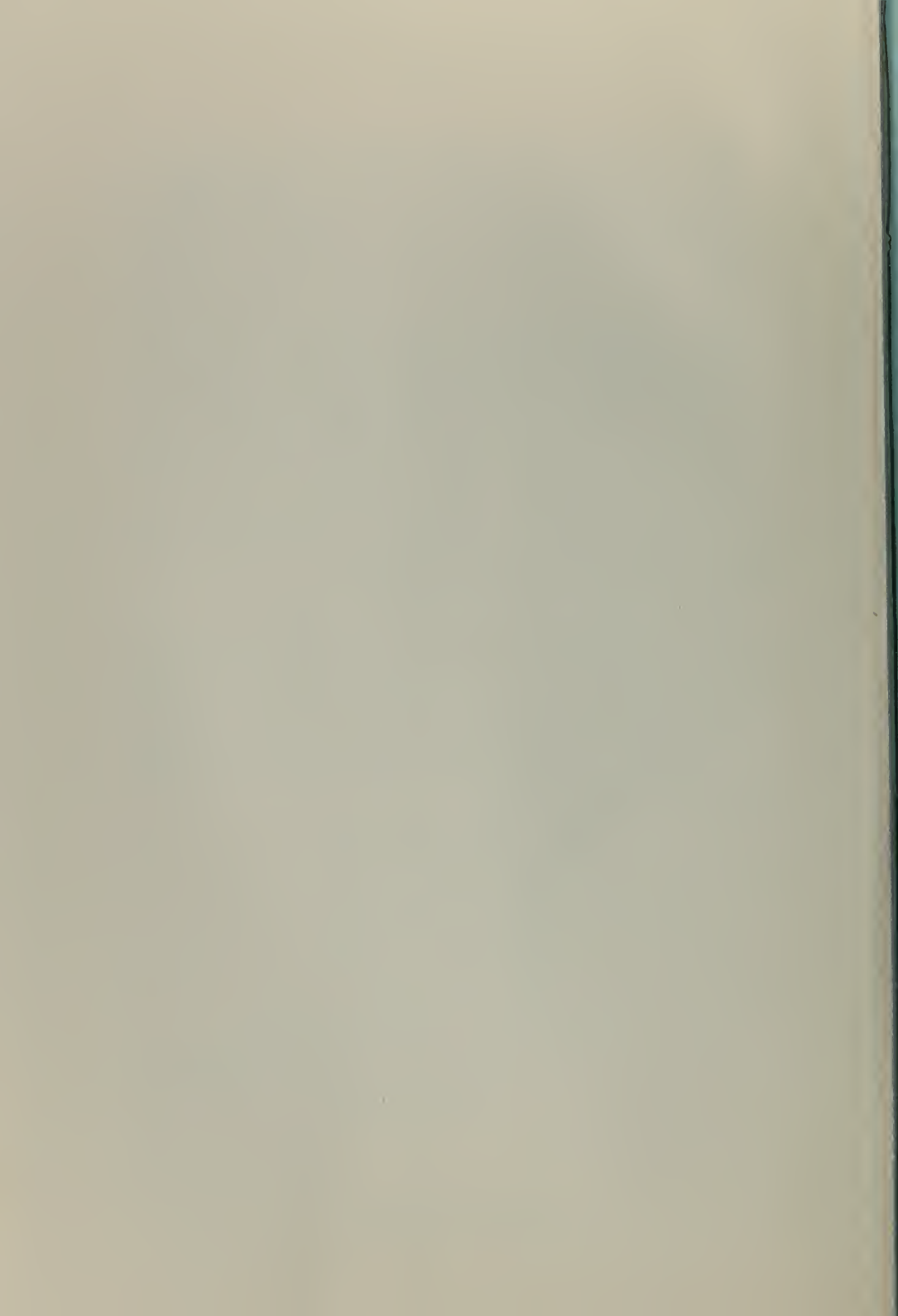
FRANCIS J. HENEY,

FREDERICK S. LYON,

WILLIAM J. CARR,

PILLSBURY, MADISON & SUTRO,

*Counsel for Defendants-Appellants  
and Petitioners.*



## **Appendix.**





## Appendix

No. 3824

*In the United States Circuit Court of Appeals  
for the Ninth Circuit.*

CENTRAL CALIFORNIA CANNERIES COMPANY ET AL.,  
*Appellants,*

vs.

DUNKLEY COMPANY (now known as MICHIGAN  
CANNING & MACHINERY COMPANY) and DUNK-  
LEY COMPANY,

*Appellees.*

Before MORROW, and HUNT, Circuit Judges, and  
DIETRICH, District Judge.

MORROW, Circuit Judge:

These suits, consolidated by stipulation of the parties, were commenced August 6, 1915, by the Dunkley Company. They are for injunctions restraining the defendants from infringing plaintiff's patent No. 1,104,175 for a device for peeling peaches and other fruits. Plaintiff's assignor, Samuel J. Dunkley, made application for the patent in suit on November 29, 1904. The application was for "the improvement in machines for peeling peaches and other fruit", patent on which was

issued July 21, 1914. In the progress of this application through the Patent Office, eight claims were added for "the process of peeling fruit and vegetables". The Examiner held that the applicant was not entitled in his machine application to prosecute claims for the process of peeling peaches, which process constituted a subject matter of invention distinct and different from that involving claims for the machine. The applicant thereupon cancelled these claims for the process in the machine application and incorporated them in an application dated June 25, 1914, for "the process of peeling peaches and other fruits and vegetables". Upon this application patent No. 1,237,623 was issued to Dunkley, August 21, 1917.

Interference was declared by the Commissioner of Patents September 3, 1907, with patent No. 864,944 issued to Beekhuis, September 3, 1907. The file wrapper shows that priority of invention and use was under critical and extended examination by the officers of the patent office for five years. All the tribunals of the patent office found that Dunkley was the first to conceive and reduce to practice the mechanism of the apparatus, provided he was entitled to make the claims of the issue. The decision turned upon the effect of the words "peeling jets of water" which are found in each of the claims. The Commissioner awarded priority to Beekhuis. Dunkley appealed from that decision to the court of appeals for the District of Columbia. That court, in a decision rendered January 6, 1913, held that:

“Dunkley was the first to invent and put into practice a rapid and effective machine for peeling peaches. This comprised in the combination the jets of water which he evidently realized aided in the removal of the skins when disintegrated by the alkali solution. That he did not realize the full extent of their agency cannot deprive him of the benefits accruing from their use. His specifications and construction afforded sufficient foundation for the claims; and as he was the first to conceive the idea and reduce it to successful practice, he is entitled to the award of priority.”

The decision was certified to the Commission of Patents. *Dunkley v. Beekhuis*, 190 O. G. 267; 39 App. D. 494.

Award of priority of invention and use was accordingly given to Dunkley by the Commissioner of Patents on June 16, 1914. A patent was thereupon issued to the plaintiff, the Dunkley Company, as the assignee of Samuel J. Dunkley.

In the present suits in the District Court of the Northern District of California, Southern Division, it was alleged that the defendants had made and were using infringing machines. Defendants' answers raised the issues of prior invention and use. Upon the trial it was contended by the defendants that the evidence was in some respects substantially different from that presented to the Court of Appeals of the District of Columbia, but Judge Van Fleet, before whom the cases were tried in the District Court, was unable to find that there was any such essential difference as to war-

rant the court in holding other than the conclusion reached by the District of Columbia court. The court accordingly held that plaintiff's patent was valid and that the defendants were infringers, and thereupon the court awarded an interlocutory decree in each case. These decrees were entered December 8, 1916, and are still pending. From these decrees in favor of plaintiff the defendants appealed to this court. The appeals were heard and the evidence reviewed. *Central Cal. Canneries Co. v. Dunkley Co.*, 247 Fed. 790. The decrees of the District Court were affirmed. A petition for rehearing was denied. A petition to the Supreme Court of the United States for certiorari was denied December 17, 1917. 245 U. S. 668.

On May 1, 1918, defendants filed a motion in this court for certain orders to the District Court, and among others, an order to vacate the above mentioned decrees; also an order to reopen the cases for further testimony and proof on behalf of the defendants. The motion was denied May 20, 1918. The order provided that the mandates of this court "are hereby directed to issue without prejudice to the right of the plaintiff-appellee herein to apply to the District Court for leave to make the Dunkley Company or such other corporation or persons as plaintiff-appellee may contend is or are proper or necessary parties plaintiff to the action". The mandates in accordance with the order of this court were issued May 20, 1918.

Thereafter, on October 14, 1918, the defendants moved the District Court to request this court to withdraw its mandates of affirmance and authorize the District

Court to set aside its decrees and all other proceedings had therein and to re-open the trial and hearing of each of said causes and permit the defendants to reform and amend their pleadings for the purpose of receiving certain alleged newly discovered evidence bearing on the validity of the plaintiff's patent and its infringement by the several defendants, and upon such hearing to enter new and different decrees if the evidence warranted such action. The grounds of this motion were in substance that subsequent to the entry of the decrees herein, in a suit on the same patent by the plaintiff and its assignee against another alleged infringer, *Dunkley Co. v. Pasadena Canning Co.*, 261 Fed. 203, tried before Judge Trippet in the District Court for the Southern District of California, certain further and additional evidence was produced and heard which it was alleged could not with reasonable diligence have been earlier discovered and was for that reason not available upon the trial of these causes; that the District Court for the Southern District of California heard the case before it and held the patent void and dismissed the bill. This last decision, it is contended by the defendants, resulted in a conflict of decision as to the validity of the patent, and it was said it would work confusion and result in hardship to the defendants. It was claimed that the newly discovered evidence was of a character which would render it probable that on another hearing the patent would be held void by the District Court. There was a further and distinct ground that at the date of the hearing in the District Court the plaintiff had



parted with all its interest in the subject matter of the suit by assigning its title in the patent pending the hearing to another corporation, and for that reason it was claimed the decrees were void and should be set aside.

The case before Judge Trippet in the Southern District of California was appealed to this court and that decree affirmed, not upon the finding that the Dunkley patent was invalid, but upon the ground that in view of the prior art the Dunkley invention was limited to the particular means employed and as so limited, defendants' device did not infringe. *Dunkley Co. v. Pasadena Canning Co.*, 261 Fed. 386. A petition to the Supreme Court of the United States for certiorari in this case was denied April 20, 1920, 253 U. S. 485.

The case of *Dunkley Co. v. California Packing Corporation* before Judge Augustus N. Hand in the District Court for the Southern District of New York, 277 Fed. 989, affirmed by the Circuit Court of Appeals in the Second Circuit, 277 Fed. 996, was also called to the attention of Judge Van Fleet upon the motion of the defendants to request this court to withdraw its mandates of affirmance and re-open the cases in the District Court. The controlling question in the New York case involved a license given by the Dunkley Company to the California Fruit Canner's Association "for the benefit of itself and its successors" in settlement of an expensive conflict between Dunkley and the Fruit Canners' Association was the assignee of Beekhuis. This license was "free of royalties of any kind whatsoever, for the use of the said invention in connection



with its business relative to the canning or treatment of fruit, granting unto the said California Friut Cannners' Association, the free right for the use of any machine or machines or invention owned or controlled by the said Dunkley Company" and covered by the patents. With respect to the question expected to grow out of the Dunkley application at issue in that case the court said:

"But the issues in this litigation differ from those in any of the preceding causes. Here, as there, anticipation and lack of invention were advanced by the defense, but in addition there is a plea of license growing out of the following uncontradicted facts."

The court thereupon states the facts of the license and its transfer and assignment by the Fruit Cannners' Association to the California Packing Corporation, the defendant in that case. The court said in its opinion:

"It is urged that this result is an attack upon Dunkley's rights as assured in the case brought in the Northern District of California, because he there obtained injunctions against two canning companies which have now been acquired by this defendant. But this is a mistaken view of legal rights; the injunction referred to necessarily ran against certain corporations; it affected the corporate personalty, and a license likewise affects persons and corporations, and does not directly reach machinery and buildings. The Griffin & Skelley Company and Central California Company may well remain under injunction and be required to account; but that is no reason why an unlimited licensee

of Dunkley's may not buy the property of these two enjoined corporations and under his license use on his own property and in his own business machines properly forbidden to the former proprietors. Holding as we do that this defendant is the plaintiff's licensee, we need not go further and consider the validity and scope of Dunkley's patents. On this point we express no opinion, but affirm the decree below on the sole ground of license."

Judge Van Fleet, referring to these decisions, reached the conclusion that with the highest consideration for the learning of both judges, he was impressed with neither the character of the new evidence nor with the conclusions reached in those cases. "That there was a cloud of 'new' witnesses," says Judge Van Fleet, "it is quite true, giving indication that the country had been raked with a 'fine-toothed comb', so to speak; but there was little 'new' evidence given by them—if the term be used to express the idea of material evidence. In fact, there is none, aside from one or two items of so-called documentary proof which does not fall strictly within the characterization of the Supreme Court as being wholly insufficient in character as a basis to set aside or defeat an existing patent".

Judge Van Fleet concludes: "In view of the considerations suggested, to grant defendants' motion would, as it seems to me, do violence to a cardinal rule for the guidance of courts, that when parties have had full opportunity to be heard there should be a period to litigation. And in the practical administra-

tion of the law a party has had full opportunity to be heard when he has been afforded a fair and reasonable opportunity.”

The court accordingly denied the defendants’ motion to request this court to withdraw its mandates and authorize the District Court to set aside its decrees and re-open the cases for the purpose of receiving new testimony bearing upon the validity of the plaintiff’s patent, and upon such rehearing to enter new and different decrees if the evidence so warranted. The court granted plaintiff’s motion to add a new party plaintiff.

The defendants prosecute their appeals from this order of the District Court. The order is not a final decree, and is not appealable in any aspect and the appeal must therefore be dismissed.

With respect to the motions of defendants for leave to file in the District Court original bills in the nature of bills of review, it will only be necessary to refer to the proceedings in these cases just stated on defendants’ appeal with these further observations by way of recital.

There is no apparent conflict between the decrees of the District Court for the Northern District of California, affirmed by this court on appeal October 1, 1917, holding the Dunkley patent No. 1,104,175 valid and infringed, *Central California Canneries Co. v. Dunkley Co.*, 247 Fed. 790, and the decree of Judge Trippet in the Southern District of California as affirmed in this court in the same case on appeal, 261 Fed. 386. In

that case the suit was on the Dunkley machine patent No. 1,104,175, and also on the Dunkley process patent, No. 1,237,623. It is true Judge Trippet held the Dunkley machine patent, No. 1,104,175, void for anticipation and also not infringed, and the Dunkley process patent, No. 1,237,623, void for lack of invention in view of the prior art. But this court did not affirm Judge Trippet's decision on such grounds. It held that the Dunkley patents were limited to the particular means employed for removing the skin of fruit after treatment, and as so limited, the patents were not infringed by the defendants in that case.

Nor is there any apparent conflict between the decree of this court holding the Dunkley machine patent valid, and the decision of Judge Augustus N. Hand in the Southern District of New York in *Dunkley Co. v. California Packing Corporation*, 277 Fed. 989, as affirmed by the Circuit Court of Appeals in the second circuit in the same case. 277 Fed. 996. In that case the suit in the Southern District of California was on both the Dunkley patents but involved also the question of a license granted by the Dunkley Company. It is true that Judge Hand in that case followed Judge Trippet in holding that patent No. 1,104,175 was void for anticipation and lack of invention and that patent No. 1,237,623 was for the function of the Dunkley machine and therefore invalid, but the Circuit Court of Appeals in the Second Circuit affirmed the decision of Judge Hand, not on the ground that the Dunkley patents were invalid, but on the ground that the defendant had succeeded to a license granted to it by defendant's pre-

decessor in interest. The decree was expressly affirmed on that sole ground and on no other.

There are numerous cases in the books dealing with the right to file a Bill of Review in proceedings in equity based on Lord Bacon's famous ordinance. In this case the right to such relief lacks one essential element. It is not sought after a final decree.

In the recent case of *Simmons v. Grier Bros.*, decided by the Supreme Court February 27, 1922, we think that court declared the equitable rule applicable in this case. In that case the plaintiffs, Frederick E. Baldwin with the John Simmons Company, brought a suit against the defendants upon a reissue patent for infringement in acetylene gas lamps and also for unfair competition. The District Court held claim 4 of the patent valid and infringed, and granted a permanent injunction, July 24, 1914, as to infringement and unfair competition, with an interlocutory decree for an accounting. Upon appeal to the Circuit Court of Appeals for the Third Circuit, the decree was affirmed as to unfair competition, but reversed as to validity of the claim of the patent involved, the appellate court holding that the claim was void. In a suit in the Southern District of New York upon the same patent by the same plaintiffs (John Simmons Company intervening), against Abercrombie & Fitch Company, it was held in direct opposition to the Pennsylvania court that the patent was valid and infringed. This decision was affirmed by the Circuit Court of Appeals for the Second Circuit and by the Supreme Court upon certiorari.



After this, plaintiffs petitioned the District Court of the Western District of Pennsylvania for leave to file what was called a "bill of review" against the decree entered January 5, 1916, upon the mandate in the Circuit Court of Appeals. The proceedings in the Pennsylvania court with respect to the right of the plaintiff to file a bill of review were finally taken to the Supreme Court upon a writ of certiorari and upon that writ the court rendered its decision February 27, 1922. The Supreme Court held that the decree of the District Court for the Western District of Pennsylvania (July 24, 1914), although following a final hearing, was not a final decree but was an interlocutory decree. Upon this state of the record the Supreme Court said: "But a bill of review is called for only after a final decree—one that finally adjudicates upon the entire merits, leaving nothing further to be done except the execution of it. If it be only interlocutory, the court at any time before final decree may modify or rescind it. Story Eq. Pl., Secs. 408a, 421, 425."

The court says further: "Regarding, therefore, the decree of January 5, 1916, as an interlocutory, not a final one, there is neither technical nor substantial ground for applying to it the rules pertaining to a bill of review and the bill herein called such is to be treated as essentially a petition for rehearing. By the 69th Equity Rule (226 U. S. 669) such a petition is in order at the term of the entry of the final decree; and, of course, if an interlocutory decree be involved, a rehearing may be sought at any time before final



decree, provided due diligence be employed and a revision be otherwise consonant with equity.”

The petition for leave to file in the District Court original bills in the nature of bills of review will therefore be denied.

Regarding the defendant’s petition for review as in effect an application for leave to the lower court to entertain a petition for a rehearing (*Simmons Co. v. B. S. Grier Bros. Co.*, *supra*), we are of the opinion that the defendants should be authorized to file in the lower court an appropriate petition for a rehearing and that court should be authorized to entertain and make disposition of the same, according to equity upon considerations addressed to the materiality of the new matter and diligence in its presentation without restraint by reason of any proceedings heretofore had or orders made in this court, and it is so ordered.

DIETRICH, District Judge, concurs in result.

(Endorsed): Opinion filed Jun. 19, 1922.

F. D. Monckton, Clerk,  
By Paul P. O’Brien,  
Deputy Clerk.

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HUNT, Circuit Judge, concurring:

I concur in the result announced in the opinion by Judge Morrow.

While I believe the appellate court in the exercise of a discretion has the power to decide that the bill, which is in the nature of a bill of review or motion

for rehearing upon the ground of newly discovered evidence, may be filed, yet it is proper practice for such court to go no further than to hold that a sufficient showing is made to warrant the appellate court in granting to petitioner permission to apply to the District Court for leave to file the bill or motion. *Watson v. Stevenson*, 53 Fed. 31; *Board of Councilmen v. Bank*, 120 Fed. 165; *In re Gamewell Fire Alarm Co.*, 73 Fed. 908.

The fact that, as affects the present matter, the District Judge has expressed an opinion upon the merits of the showing made by petitioner would seem to appeal to this court for a final determination of the question of the right to file the bill. But, on the other hand, as the opinion of the District Court was permaturely formed, it may be well assumed that when the matter is properly brought before that court it will have that same consideration that it would be entitled to as though initially presented.

(Endorsed): Concurring Opinion, filed June 19, 1922.

F. D. Monckton, Clerk,

By Paul P. O'Brien,

Deputy Clerk.